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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum decision and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM DECISION

Requester: Daniel Granillo
Agency: Department of Public Safety
Date: June 30, 2017
Subject: Denial of Inmate Transfer Records (APPEAL 14-22)

Requester is an inmate seeking a decision as to whether the Department of Public Safety's (PSD) denial of access to two "Internal Memorandum" (IM) documents related to his transfers between correctional centers on August 25, 2009, and October 18, 2012, was proper under the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to PSD dated August 3, 2013; Requester's letters to OIP dated October 20, 2013, and November 18, 2013; PSD's letters to OIP dated November 8, 2013, and March 19, 2014; PSD's letter to Requester dated November 8, 2013; and PSD's e-mail messages to OIP dated May 25, 2017, May 30, 2017, with attachment, and June 6, 2017.

Decision

PSD claims it does not maintain any records for the inmate transfer on August 25, 2009, and therefore is unable disclose any transfer records. The UIPA applies only to existing records maintained by an agency. However, because PSD's assertion that no records existed for the 2012 transfer was successfully refuted by Requester, PSD must conduct another search for any records documenting Requester's 2009 transfer.

The October 2012 IM should be disclosed to Requester under Part III of the UIPA because the IM is the personal record of Requester, who is the subject of the IM. The IM is also a joint personal record of the other inmate who was transferred with Requester, the three Adult Corrections Officers (ACO) handling the transfer, and the ACO who prepared the IM. As none of the exceptions under Part III of the UIPA are applicable, the entire IM must be disclosed to Requester.

Statement of Reasons for Decision

I. Facts

On August 3, 2013, Requester made a written personal record request to PSD for any records of his transfers on August 25, 2009 and October 18, 2012 between Saguaro Correctional Center (SCC) and Red Rock Correctional Center (RRCC).¹ On October 20, 2013, Requester made a request for assistance to OIP because PSD had not responded to his record request.

OIP wrote to PSD on November 5, 2013 regarding Requester's request for assistance. In a letter dated November 8, 2013, PSD's Director Ted Sakai replied to OIP stating that PSD had not received Requester's record request. Director Sakai noted that based on OIP's letter of November 5, 2013 and Requester's enclosed record request, Requester was seeking records related to his transfers on August 25, 2009 and October 18, 2012, and stated that "[b]ased on inquiries with the Mainland Branch Unit there are no documents responsive to his request, because the Wardens of both neighboring correctional centers manage this type of inmate movement through verbally (sic) request." Director Sakai included a copy of PSD's letter to Requester of November 8, 2013, from Ms. Shelley Nobriga, PSD's Litigation Coordination Officer, denying access because "there are no documents responsive to your letter dated August 3, 2013."

After receiving PSD's response to his record request, Requester appealed to OIP on November 18, 2013, contending that a record existed, and enclosed a copy of a court document dated May 15, 2013, with the heading "State v. Daniel Granillo, Cr. No. 89-0220(2), Document Redact/Withheld Log" (Log). In the Log, there is an entry for "Internal memo re transfer of Granillo, other inmate 10-18-12." OIP sent a Notice of Appeal to PSD on December 3, 2013, with a copy of Requester's appeal to OIP and the Log.

¹ OIP understands that, at the time of the transfers, PSD was contracting with SCC and RRCC to house inmates in PSD's custody.

On March 19, 2014, PSD acknowledged to OIP that an IM was maintained by the contractor at SCC regarding the transfer of Requester and another inmate. However, PSD would not disclose the internal IM based on section 92F-22(1)(B), HRS, which is discussed at page 4 *infra*, because the memorandum included information on the transfer of another inmate. PSD's position was that Requester did not have the right to access information regarding the other inmate or the IM due to "security, safety and privacy concerns." In addition, PSD's position is that the document is exempt under Part II of the UIPA based on section 92F-13(3), HRS,² because a "correctional agency has unique security and operational confidentiality requirements to ensure the safety of operations, staff, inmates and the public."

On May 17, 2017, OIP requested an unredacted copy of the IM from PSD and referred to PSD's letter of March 19, 2014, which stated that an IM existed. According to an e-mail message from PSD to OIP dated May 25, 2017, PSD contacted the Mainland Branch Unit and the Branch Unit indicated that it had no record of PSD's letter of March 19, 2014, and was not aware of any IM referred to in PSD's letter of March 19, 2014.

In a reply e-mail message of May 25, 2017, OIP provided PSD with information from the Log that referenced the Requester's transfer on October 18, 2012. Previously, in its Notice of Appeal dated December 3, 2013, OIP had provided PSD with a copy of the Log. Despite having previously denied the existence of any record, on May 30, 2017, PSD provided OIP with an unredacted copy of the "Notification to Administration" dated October 18, 2012, which is being referred to as the IM in this Memorandum Decision, regarding the transfer of Requester from SCC to RRCC on October 18, 2012. The IM contains the date, time, and description of the transfer including the names of the people involved.

II. Responding to Requests for Records that Allegedly Do Not Exist

While agencies are not required to create records where none exist in order to respond to UIPA requests, an agency denying access has the burden of justifying each nondisclosure. OIP Op. Ltr. No. 97-8; HRS § 92F-15(c). Here, PSD initially informed OIP and Requester that it did not maintain an IM for either of Requester's transfers. PSD's assertion that no records existed for the 2012 transfer was successfully refuted by Requester and PSD eventually provided a copy of the IM for

² Section 92F-13(3), HRS, allows an agency to withhold government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. This exception does not apply to personal record requests. As explained on page 4, *infra*, personal record requests are subject to the exemptions at section 92F-22, HRS.

the 2012 transfer. However, PSD provided no information as to how it had searched for records regarding the 2009 transfer, which were never produced.

Given the lack of evidence as to how PSD searched for responsive records, and the evidence that PSD did miss a similar responsive record regarding the 2012 transfer, OIP concludes that PSD has not met its burden to establish that it conducted a reasonable search for the IM for the 2009 transfer. PSD, therefore, must conduct another search for any records documenting Requester's August 25, 2009 transfer in accordance with OIP Opinion Letter Number 97-8 at 5 (stating that an agency must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested") and then provide Requester with proper notice as required by section 2-71-14, HAR.

III. The UIPA Requires the Disclosure of Portions of the IM that are the Personal Record of Requester

A "personal record" is a record that contains information "about" the requester. Specifically, the UIPA defines "personal record" to mean "any item, collection, or grouping of information about an individual that is maintained by an agency," including "items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." HRS § 92F-3 (2012).

The IM contains information about the Requester. Requester is identified by name on the IM and the IM contains information about the transfer of the Requester from SCC to RRCC. Therefore, the IM is "about" the Requester and is deemed a personal record of Requester subject to Part III of the UIPA.

Under Part III, an agency must allow a requester access to his or her personal record unless the record or the information contained in the record falls within one of the exemptions to disclosure listed in section 92F-22, HRS. With respect to the 2012 IM, PSD asserted it was not disclosing the IM based on section 92F-22(1)(B), HRS, which provides that an agency need not disclose records that are

[m]aintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:

....

- (B) Reports prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

HRS § 92F-22(1)(B) (2012). PSD's position was that the IM was a "report" exempted from disclosure under section 92F-13(1)(B), HRS.

Not all records in an inmate's file constitute a "report" protected from disclosure. *C.f.* OIP Op. Ltr. No. 05-14 at 4-5 (concluding that PSD may withhold the Sex Offender Custody Level Review form from the inmate it pertains to under section 92F-22(1)(B), HRS, because it is a report prepared or compiled during the confinement or correctional supervision stage of the criminal law enforcement process). To fall within the exemption at section 92F-22(1)(B), HRS, a report must have been prepared by a "criminal law enforcement agency," and OIP previously found in OIP Opinion Letter Number 95-11 at page 7 that PSD is such an agency.

Having established that PSD is a criminal law enforcement agency, OIP next considers whether the document in question is a report that must be protected from disclosure under section 92F-22(1)(B), HRS. Previously, OIP has followed a federal court's interpretation of a nearly identical exemption in the federal Privacy Act, 5 U.S.C. § 552a(j)(2)(C) (1988). OIP Op. Ltr. No. 95-11 at 7-9 (holding that a report prepared or compiled during an inmate's confinement to determine whether to approve or deny the inmates request to transfer to a lower security facility was not subject to disclosure). The federal court reasoned that in order for a criminal law enforcement agency (the Federal Bureau of Prisons) to withhold a report from the inmate that it is about, the withholding must be "essential to protect internal processes by which Bureau personnel are able to formulate decisions and policies with regard to federal prisoners, to prevent disclosure of information to federal inmates that would jeopardize legitimate correctional interests of security, custody, or rehabilitation, and to permit receipt of relevant information from other federal agencies, and federal and state probation and judicial officers." *Id.*, citing Turner v. Ralston, 567 F. Supp. 606 (W.D. Mo. 1983) (quoting 28 C.F.R. 16.97(b)(3) (Supp. 1992)).

The IM in this case is a pre-printed form titled "Notification to Administration." There are sections where the preparer can check the appropriate answer choices and other sections where the preparer types in an appropriate response. There is nothing in the completed IM that contains Requester's background information, noteworthy facts and behaviors observed during incarceration, recommendations, or legitimate correctional interests. The IM is not used to make any determinations about an inmate's incarceration status, and it simply evidences an inmate's physical transfer from one location to another. Moreover, no security concerns during the transfer process are implicated since the transfer had been completed approximately nine and one-half months before Requester's record request on

August 3, 2013.³ Consequently, OIP concludes that the IM was not a “report” protected from disclosure under section 92F-22(1)(B), HRS, and that portion of the IM that is the Requester’s personal record must be disclosed to him.

IV. Although the IM is a Joint Personal Record of Both Inmates and All Four ACOs, the UIPA Requires the Disclosure of the Entire IM to Requester

The IM also contains information about the “other inmate” being transferred, three ACOs handling the transfer, and the ACO preparing the report. Since the IM contains information about other persons named on the IM, the information about each individual is his or her own personal record. As these other individuals’ personal records are intertwined with Requester’s own personal record, there are portions of the IM that must be analyzed as a “joint personal record.”

OIP provided guidance on joint personal records in a previous opinion regarding an investigative report involving multiple persons. As OIP explained,

where a record is a joint personal record, *i.e.*, it is “about” two or more persons, there is a presumption that the entire record is accessible by each of those persons as a personal record, subject to the exemptions in section 92F-22, HRS. See OIP Op. Ltr. No. 03-18. . . . In other instances in which certain information “about” another individual also relates to or is intertwined with information about the requester, such information must be considered to be part of the personal record of each and is not subject to redaction for a request made by either party. . . . For example, the names of the witnesses and the alleged assailant, as well as the alleged assailant’s photograph, relate to and are intertwined with the portions of the report that are “about” the requester and, therefore, cannot be redacted from the copy of the report that is made available to the requester.

Other information, however, such as the home addresses and residence telephone numbers of the witnesses and the alleged assailant, are not “about” the requester because they are not related to or intertwined with the substance of the report. This specific information is, therefore, not part of the personal record of the requester. See Haw. Rev. Stat. § 92F-3. A request for access to this information, thus, must instead be considered to be a general record

³ This opinion deals specifically with the disclosure of the IM after the transfer date, and does not address disclosure prior to the transfer. Had Requester sought access to transfer documents prior to the transfer, it is possible that security concerns may be implicated and section 92F-22(1)(B), HRS, may have allowed PSD to withhold access to the IM in its entirety. However, OIP need not and does not make a determination on that issue in this opinion.

request by the requester under part II of the UIPA, subject to the exceptions to disclosure contained in that part. Viewing the request in this manner, it is our opinion that the disclosure of this information would be a clearly unwarranted invasion of the personal privacy of the witnesses and the alleged assailant and that, accordingly, this information may be withheld under section 92F-13(1), HRS. See OIP Op. Ltr. No. 94-3 at 11-13 (segregation of information under section 92F-13(1)). For the same reason, it is our opinion that the social security numbers, dates of birth, ages, sexes, occupations and employer information of the witnesses may also be withheld.

OIP Op. Ltr. No. 05-10 at 4-5 (footnotes omitted).

Here, the IM memorialized the transfer of Requester and another inmate by three ACOs on October 18, 2012, from SCC to RRCC and is considered a joint personal record of Requester and the other individuals named therein. The other transferred inmate's name, as well as the names and job titles of the ACOs, relate to and are intertwined with the information about the Requester's transfer and cannot be redacted from the report. Likewise, the name of the preparer of the IM cannot be redacted.

There is no information in the IM that is solely about other individuals and not Requester, such as the home addresses, resident telephone numbers, social security numbers, or dates of birth, that would not be part of Requester's personal record and could instead be withheld under the UIPA's privacy exception. See OIP Op. Ltr. 05-10 at 5. Consequently, there is no basis for withholding any portion of the IM from Requester under Part II of the UIPA.

As PSD has not met its burden under section 92F-15(c), HRS, to justify withholding the IM, OIP concludes that the entire IM must be disclosed to the Requester without any redactions.

Right to Bring Suit

Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling. HRS § 92F-27(f).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

If the court finds that the agency knowingly or intentionally violated a provision under Part III of the UIPA, the agency will be liable for: (1) actual damages (but in

no case less than \$1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e). If Requester decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This opinion constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this request for assistance. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



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